APPEAL NO. 010772

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 13, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fifth quarter. The appellant (carrier) appealed that determination as being contrary to the great weight and preponderance of the evidence. The claimant did not respond to the appeal.

DECISION

Reversed and rendered.

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provide the statutory and regulatory requirements for entitlement to SIBs.

The parties stipulated that the claimant sustained a compensable injury on _____; that impairment income benefits were not commuted; that the claimant has an impairment rating of 16%; and that the qualifying period for the fifth quarter was from September 13, 2000, through December 12, 2000.

Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer made findings that the claimant had no ability to work, that there are narrative reports from Dr. D and Dr. C which specifically explain how the injury causes a total inability of the claimant to work, and there is no other record that shows that the claimant is able to return to work.

The hearing officer was aware of and commented upon the report of Dr. U, the required medical examination doctor, who conducted an examination of the claimant on September 7, 2000. Dr. U believed that the claimant could do work which involved intermittent activities using mostly his upper extremities, and which would allow changing back and forth from sitting to standing. Dr. U provided a January 10, 2001, clarification letter in which he stated that he did not think that claimant was precluded from working, or that claimant was totally disabled. He did note that no functional capacity evaluation had been performed, but added that it was his “suspicion” that the claimant could do light work.

The hearing officer's determination that there is no other record which shows that the claimant is able to return to work is so against the great weight and preponderance of the evidence as to be manifestly unjust. We, therefore, reverse the hearing officer's finding of fact that there is no other record which shows that the claimant is able to return to work.

As we stated in Texas Workers' Compensation Commission Appeal No. 002095, decided October 18, 2000:

> The current SIBs rules are demanding and require that the elements of Rule 130.102(d)(4) must be met to establish good faith in a no-ability-to-work situation. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. One of those elements is that "no other records show that the injured employee is able to return to work." We have previously noted in a number of decisions that the requirements under Rule 130.102(d)(4) cannot be discarded without compelling reasons supported in the record. Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000.

Here, the report of Dr. U was rendered shortly before the qualifying period and would qualify as an "other record" showing some ability to work. The hearing officer did not provide "compelling reasons supported in the record" for ignoring Dr. U's report; in fact, he offered no explanation at all for disregarding the report. The evidence therefore fails to meet the requirements of Rule 130.102(d)(4) for establishing good faith, and the hearing officer's determination that the claimant is entitled to SIBs for the fifth quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We reverse the hearing officer's decision and render a new decision that the claimant is not entitled to SIBs for the fifth quarter.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Thomas A. Knapp
Appeals Judge